No. 83-1387

IN THE

Supreme Court of the United States

October Term, 1983

LEONA M. HOLT,
Plaintiff-Appellant,

v.

COUNTY OF TIOGA, NEW YORK,
Defendant-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

Supplement to Jurisdictional Statement—
State Civil Case

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Opinion of the Appellate Division, Third Department, 95 A.D.2d 934, Decided June 16, 1983.

10 LEONA M. HOLT, Appellant, v. COUNTY OF TIOGA, Respondent.—Appeal (1) from an order of the Supreme Court at Special Term (Bryant, J.), entered October 12, 1982 in Tioga County, which granted defendant's motion for summary judgment dismissing plaintiff's complaint, and (2) from the judgment entered thereon. Plaintiff was injured in an accident on West Creek Road in Tioga County when the right wheels of the pickup truck she was driving fell into a depression or drop-off on the edge of the pavement causing the vehicle to veer across the highway and collide with a tree. Suit was brought against the county for negligently maintaining the shoulder. The county interposed as an affirmative defense that it had not been given prior notice of the defective condition as was required by Tioga County Local Law No. 2 of 1978. Our earlier decision declaring the local law repugnant to section 139 of the Highway Law and therefore unconstitutional (82 AD2d 991) was reversed on appeal (56 NY2d 414). On remittal, Special Term found that prior notice of the shoulder condition giving rise to the accident had not been furnished, dismissed plaintiff's estoppel and constitutional arguments, and granted summary judgment in favor of defendant. Plaintiff contends that Local Law No. 2 contravenes the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. Initially, we note that since neither we nor the Court of Appeals expressly addressed these particular constitutional claims earlier, the doctrine of law of the case does not hinder our consideration of them now (see *Barrett v. State Mut. Life Assur. Co.*, 58 AD2d 320, affd 44 NY2d 872, cert den 440 US 912). As for the merits of this argument we find no constitutional violation. The right to sue

a subdivision of the State for negligence in the performance of a governmental function is founded upon statute and the legislative authority involved may properly limit such right as it sees fit (*Matter of Brown v. Board of Trustees of Town of Hamptonburg, School Dist. No. 4*, 303 NY 484, 489; *MacMullen v. City of Middletown*, 187 NY 37). Since Local Law No. 2, which was in effect at the time of the accident, defined a right to sue only if prior written notice had been given to the county, the absence of such notice means that plaintiff never possessed a vested right to bring an action. Moreover, the statute possesses a rational basis in that it enables the county to protect the traveling public (*Martin v. City of Cohoes*, 37 NY2d 162, 166); for these reasons we find no denial of due process. We also reject the argument that Local Law No. 2 has been applied in an impermissibly retroactive manner. This position is based upon the premise that the alleged defect in the shoulder of the road existed prior to the enactment of the statute and that the county should not be permitted to legislate away liability for such a defect by imposing a prior notice requirement. Plaintiff's focus solely on the existence of the defect is, however, misguided because her purported right to sue could not have vested until the occurrence of the accident, at which point Local Law No. 2 had been in effect for over four months. Thus, the statute has not been retroactively applied (see *Dodin v. Dodin*, 17 Misc 35, 40, affd 16 App Div 42, affd 162 NY 635). The equal protection argument is similarly unavailing. All victims involved in Tioga County accidents caused by improper highway maintenance are required to demonstrate prior notice. Furthermore, it is not illogical to allow each county to determine whether a prior written notice ordinance is desirable, for each is responsible for the maintenance of certain roadways within its geographical jurisdiction and dissimilar local road conditions exist in different

parts of the State. With respect to the assertion that the notice requirement of the local law had indeed been complied with, the most sanguine showing plaintiff makes is that a resident of the West Creek Road area had, once in 1976 and again 13 days before the accident, complained to the county about the condition of the road's shoulder. Each complaint was directed at a point concededly located at least one-quarter mile away from the place where plaintiff's truck left the highway; Special Term quite correctly found this to be inadequate notice. While the local law is silent as to the specificity required of the prior notice, it should at the very least be such that it would "probably have brought the particular condition at issue" to the attention of the authorities (*Brooks v. City of Binghamton,* 55 AD2d 482, 483-484). Notification of a hole in the shoulder of the road a quarter of a mile from the accident scene did not create an awareness of the defect which is at the center of this controversy. Moreover, the fact that county personnel, in the course of responding to these complaints, may have driven by the site which allegedly precipitated the accident does not render the county liable. Except where unusual circumstances are shown to prevail (see *Blake v. City of Albany,* 63 AD2d 1075, affd 48 NY2d 875, where the area in question was inspected on an almost daily basis by the city to ensure against the very danger which caused the accident), it is the prior written notice and not possible actual or constructive knowledge on the municipality's part which affords the plaintiff the right to recover under these statutes (*MacMullen v. City of Middletown,* 187 NY 37, 47, *supra*); thus, the notice provision must be strictly respected. Finally, we reject the contention that the county should be estopped from taking refuge in the local law because it failed to observe the statute's record-keeping provisions which require that "the County Clerk and the County Superintendent of Highways shall

keep an indexed record, in a separate book, of all notices which they shall receive". Apparently only the superintendent of highways kept such a record. Not only is the language of the statute unclear concerning the responsibility of each to keep a separate record, but defendant did in fact receive the information respecting prior notifications from the superintendent of highways; more importantly, nothing in the record indicates plaintiff relied to her detriment upon the county's failure to maintain a duplicate set of these records (see *Andersen v. Long Is. R.R.*, 88 AD2d 328, 342). Order and judgment affirmed, without costs. Main, J.P., Mikoll, Yesawich, Jr., Weiss and Levine, JJ., concur.

Memoranda, Third Department, June, 1981.

15 LENA HOLT, Respondent, v. COUNTY OF TIOGA, Appellant.—Appeal from an order of the Supreme Court at Special Term (Keane, J.), entered December 4, 1980 in Tioga County, which, *inter alia,* denied defendant's motion to dismiss the complaint. Shortly after midnight on November 19, 1978, plaintiff was operating her 1973 Ford pick-up truck in a generally northerly direction on County Road 33 in Tioga County. She alleges that the right wheels dropped into a depression or drop-off on the edge of the pavement which caused her to lose control of the vehicle and resulted in her receiving serious personal injuries. Thereafter, plaintiff commenced an action against defendant alleging that her injuries were the result of defendant's negligence in the maintenance of the highway. By answer, defendant denied the material allegations in the complaint and asserted, as an affirmative defense, plaintiff's failure to comply with Tioga County Local Law No. 2 of 1978 which, in relevant part, provides that no civil action with respect to a highway defect may be maintained against the county unless prior written notice of the dangerous condition or defect has been given to the county. Defendant moved to dismiss the complaint for the above reason and plaintiff countered with, *inter alia,* the assertion that Local Law No. 2 was unconstitutional. It is well established that "The exceedingly strong presumption of constitutionality applies not only to enactments of the Legislature but to ordinances of municipalities as well. While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality" (*Lighthouse Shores v. Town of Islip,* 41 NY2d 7, 11). Nonetheless, we conclude that Local Law No. 2 does not pass constitutional muster. Article IX (§2, subd [c]) of the New York Constitution

grants to every local government the power to adopt local laws relating to its property, affairs or government, and the implementing statute clearly provides that the local law may not be inconsistent with any general law relating to its property, affairs or government (Municipal Home Rule Law, §10, subd 1, par [i]). A general law is defined as one "which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages" (NY Const, art IX, §3, subd [d], par [1]). Section 139 of the Highway Law is such a general law and it permits the maintenance of the civil action against the county in consequence of the negligence of the county, its officers, agents or servants for defective, out of repair, unsafe, dangerous or obstructed highways. There is no prior written notice provision. Hence, Local Law No. 2 is incompatible and unharmonious with the general law, inconsistent with it (see *Town of Clifton Park v. C.P. Enterprises*, 45 AD2d 96), and, therefore, unconstitutional insofar as it requires prior written notice. Defendant's reliance upon *Klimek v. Town of Ghent* (71 AD2d 359) is misplaced. Our holding there was based upon section 10 (subd 1, par [ii], cl d, subcl [3]) of the Municipal Home Rule Law and the town's usage of the power it conveys. While the Legislature has seen fit to specifically provide villages (Village Law, §6-628) and towns (Town Law), §65-a) with the power to enact prior notice provisions, it has consistently withheld its approval of such legislation for counties. Accordingly, since Tioga County's Local Law No. 2 of 1978 is plainly inconsistent with the general law to the extent that it requires prior written notice of defects, it is unconstitutional and the plaintiff is entitled to summary judgment to that effect. Order modified, on the law, by adding thereto a paragraph striking the second affirmative defense in the answer, and, as so modified, affirmed, with costs to plaintiff. Mahoney, P.J., Main, Mikoll, Yesawich, Jr., and Herlihy, JJ., concur.